United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1321

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B
P/S

UNITED STATES OF AMERICA,

Appellee

v s

JEROME REYNOLDS and MELVIN JACKSON,

Appellants

Docket No. 76-1321

BRIEF FOR APPELLANTS

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PRELIMINARY STATEMENT

Appellants, Jerome Reynolds and Melvin Jackson, were convicted on May 14, 1976 after a jury trial before the Honorable John T. Elfvin, United States District Judge for the Western District of New York, on a one count Indictment that charged them with knowingly, intentionally and unlawfully possessing with intent to distribute approximately 10.67 grams gross weight of a substance containing

heroin, a Schedule I controlled substance as set forth in Title 21, United States Code, Section 812; all in violation of Title 21, United States Code, Section 841 (a) (1).

On June 14, 1976, Jerome Reynolds was sentenced to a term of ten years and Melvin Jackson was sentenced to a term of five years. This Appeal is from the judgment of conviction.

STATEMENT OF FACTS

Sometime on or about the 10th day of July 1975, at approximately 4:30 PM, appellants, while occupying Mr. Reynolds' vehicle, allegedly sold a quantity of heroin to DEA Agent, Kenneth B. Peterson, at the Buffalo Botanical Gardens. The alleged purchase consisted of five bundles of packets of alleged heroin, more specifically 36 individual glassine envelops containing an off white powder substance.

At the trial, commencing on May 13, 1976, Agent Peterson testified that Government's Exhibit I, which bore his initials, contained all the packets which he had originally obtained from the appellants; although they were not all initialed, only some were.

The Government next called upon Gladstone A. Griffith, a Forensic Chemist with DEA, to testify as to the contents of Government's Exhibit I. Mr. Griffith testified that he had examined Government's Exhibit I in his laboratory and such fact was evidenced by his initials on the bag (Tr.7). Mr. Griffith further testified that Government's Exhibit I contained heroin, procaine and sugar (Tr.8), and that those results were derived from a "composite from the envelops.....analyzed" (Tr.9).

Upon cross examination by appellants' attorney, Mr. Griffith stated that he only screen tested fifteen (Tr.37) of the thirty-five (Tr.38) odd envelops and that the results were inconclusive (Tr.18,Tr.23).

Mr. Griffith then proceeded from the initial screening of the fifteen bags and took eight bags out of this group of fifteen (Tr.38) and made up a composite sample from the eight bags (Tr.39) which he testified tested positive for heroin. He further testified that he could "definitely not" (Tr.39) say that all eight bags tested contained heroin. The most that he could conclude was that at least one of the eight bags tested contained heroin (Tr.39). At no time during his analysis did Mr. Griffith initial any of the fifteen bags which he chemically analyzed in his laboratory.

After the Government rested its case, defense counsel moved that all the glassine envelops which were not tested be excluded from evidence (Tr.47,48), to which the Court replied "How do we know which ones were tested" (Tr.48). Inasmuch as it was unknown which bags contained heroin, defense counsel moved that Government's Exhibit I be excluded from evidence (Tr.48). The Government opposed the Motion claiming there was sufficient evidence for Government's Exhibit I to go to the jury to determine whether it was all heroin (Tr.54).

The Court, over defense counsel's objection, admitted the entire package, Government's Exhibit I, as heroin (Tr.65), into evidence, stating:

> "The evidence does reliably show that in one bag, and we don't know which among the thirty-four or so which were contained in the baggie bag, which Mr. Peterson said he got from Mr. Reynolds on that date, did contain heroin. We do not know which bag, but it is not important. We have a quantity of substance which is contained in a quantity of envelopes, of bags, and it is sufficient for the Government's case if there be shown to have been a measurable amount, an amount which does enable the chemist to say definitively that there was heroin present among those various bags. So I am denying both of the defense motions. Now, I get back to my narrow question, and I see no reason to upset the admission of Government's Exhibit I in evidence, and I will allow it to remain in evidence." (Tr.63).

The Court then went on and permitted Government's Exhibit I to go to the jury deliberating room with the jurors.

QUESTION PRESENTED

Did the District Court err in admitting Government's Exhibit I into evidence resulting in prejudicial error?

ARGUMENT

THE DISTRICT COURT ERRED AND COMMITTED PREJUDICIAL ERROR IN ADMITTING GOVERNMENT'S EXHIBIT I INTO EVIDENCE.

The District Court admitted into evidence Government's Exhibit I, all thirty-five bags, as heroin (Tr.65). All this despite the chemist's uncontroverted testimony that he never examined all thirty-five glassine bags, but merely fifteen random bags which he never marked (Tr.38). The chemist further testified that the most he could conclude from his analysis was that at least one of the glassine bags he tested contained heroin (Tr.39). The chemist arrived at this conclusion after taking a composite sample of eight of the glassine bags, which had been separated from the original group of fifteen bags randomly selected by him for testing from Government's

Exhibit I, which contained a total of some thirty-five glassine bags (Tr. 38,39).

The Court agrees with appellants' position that the evidence does "reliably"show the presence of heroin in one bag and no more and states:

> "The evidence does reliably show that in one bag, and we don't know which among the thirty-four or so which were contained in the baggie bag, (referring to the bag containing Government's Exhibit I)
>
> . . . did contain heroin. We do not know which bag, but it is not important. We have a quantity of substance which is contained in a quantity of envelopes, of bags, and it is sufficient for the Government's case if there be shown to have been a measurable amount, an amount which does enable the chemist to say definitively that there was heroin present among those various bags. So I am denying both of the defense motions." [emphasis added] Tr.63.

However, over appellants counsel's objection, the Court admitted the entire exhibit, containing both tested and untested materials, into evidence as heroin (Tr.65), to the great prejudice of appellants' case. No instructions were given as to its admission into evidence for any particular limited purpose. It can only

be concluded that it was in evidence as being totally heroin, which the Court acknowledges it could not be (Tr.63) in light of the chemist's testimony. Under United States v Brown, 482,F.2d 1226, 1228 (8th Cir., 1973) we concede that the package could be admitted into evidence; however, not as a package of heroin. Only those glassine bags analyzed and confirmed to be heroin should have been admitted, the remainder should have been excluded as requested by defense counsel (Tr.47).

Appellants were further prejudiced by permitting the jury to consider the amount of substance within Government's Exhibit I, leading to the conclusion that the defendants intended to distribute the alleged heroin. It is appellants contention, that had only the substance analyzed and proven to be heroin, one bag or so, been admitted into evidence, the jury would have likely returned a verdict on the lesser included offense, simple possession of a controlled substance. The jury certainly is entitled to consider the amount of a controlled substance as proper circumstantial evidence, United States v Blake, 484 F.2d 50,58 [and other cases cited therein] (8th Cir.,1973); however, it should not be induced to infer the intention to distribute by being presented with exhibits containing large amount of substance misrepresented as a controlled substance.

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CERTIFICATE OF SERVICE

Docket No. 76-1321

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MELVIN JACKSON

Appellants

I, ROCCO D. POTENZA, attorney for the appellants in the above-entitled action, hereby certify that on the 27th day of August 1976, I served the attached Brief for Appellants upon the United States Attorney for the Western District of New York, attorney for the Appellee, by depositing a copy in the United States mails, postpaid, and addressed to him at the United States Courthouse, Buffalo, New York 14202, his last known address.

Dated: Buffalo, New York
August 27, 1976

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CONCLUSION

It is respectfully submitted that for the foregoing reasons, the judgment of conviction should be reversed.

Respectfully submitted,

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